Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

OREGON DEPARTMENT OF REVENUE

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

---

BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION, THE VETERANS OF FOREIGN WARS OF THE UNITED STATES OF AMERICA, AND TWENTY-SEVEN OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONER

MICHAEL J. KATOR *
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

September 14, 1995

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	2
REASONS FOR GRANTING THE PETITION	3
I. THE DECISION BELOW IS IRRECONCILABLE WITH *REICH*	5
II. THIS COURT CANNOT ALLOW STATES' NOTIONS OF FISCAL EXPEDIENCY TO EXCUSE DEFIANCE OF ITS DECISIONS	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Barker v. Kansas, 503 U.S. 594 (1992)	4
Bass v. South Carolina, 113 S. Ct. 3025 (1993)	4
Brown v. Paige, 115 S. Ct. 207 (1994)	4
Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989)	3
Duffy v. Wetzler, 115 S. Ct. 779 (1995)	4
Estate of Bohn v. Waddell, 113 S. Ct. 3000 (1993)	3
Filios v. Commissioner of Revenue, 114 S. Ct. 1538 (1994)	4
General Motors Corp. v. Kansas City, Missouri, U.S. No. 95-195	11, 12
Hackman v. Missouri Department of Revenue, 493 U.S. 1019 (1990)	4
Harper v. Virginia Department of Taxation, 113 S. Ct. 2510 (1993)	4, 13
Hogan v. Musolf, 502 U.S. 1030 (1992)	4
Kuhn v. Colorado, 504 U.S. 901 (1992)	4
Lewy v. Virginia Department of Taxation, 113 S. Ct. 3024 (1993)	4
McManus v. Iowa, 502 U.S. 823 (1991)	4
Meredith v. State Tax Commission, 96 P.2d 1082 (Or. 1939)	10
Mitchum v. Foster, 407 U.S. 225 (1972)	11, 12
National Private Truck Council v. Oklahoma Tax Commission, 115 S. Ct. 2351 (1995)	5, 11
Nutbrown v. Munn, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992)	4, 8, 9
Pledger v. Bosnick, 113 S. Ct. 3034 (1993)	3
Reich v. Collins, 115 S. Ct. 547 (1994)	*passim*
Sheehy v. Montana, 113 S. Ct. 3025 (1993)	4
Smith Kline & French Laboratories v. State Tax Commission, 403 P.2d 375 (Or. 1965)	9
Swanson v. North Carolina, 115 S. Ct. 662 (1995)	4
Swanson v. Powers, 112 S. Ct. 871 (1992)	4
Waterbury v. Department of Revenue, 11 Or. Tax 314 (1989)	9
Wood v. Department of Revenue, 749 P.2d 1169 (Or. 1988)	9

TABLE OF AUTHORITIES—Continued

STATUTES	Page
4 U.S.C. § 111	3
42 U.S.C. § 1983	8, 9, 11
Or. Rev. Stat. § 305.220	8
Or. Rev. Stat. § 305.222	8
Or. Rev. Stat. § 305.270	*passim*
Or. Rev. Stat. § 305.765	6, 7, 8, 9
Or. Rev. Stat. § 305.770	7
Or. Rev. Stat. § 314.415	8
Va. Code § 58.1-499	12
OTHER AUTHORITIES	
19 Op. Att'y Gen. 557 (Or. 1940)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-279

WILLIAM T. ATKINS,

Petitioner,

v.

OREGON DEPARTMENT OF REVENUE

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

---

BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION, THE VETERANS OF FOREIGN WARS OF THE UNITED STATES OF AMERICA, AND TWENTY-SEVEN OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONER

The Retired Officers Association, the Veterans of Foreign Wars of the United States of America, and twenty-seven other military and veteran organizations file this brief *amici curiae* in support of petitioner and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of Oregon.[1]

---

[1] Counsel for petitioner and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

INTEREST OF *AMICI*

Amici are The Retired Officer Association (TROA), the Veterans of Foreign Wars of the United States of America (VFW), and twenty-seven other military and veteran organizations.[2] TROA is a not for profit corporation that is dedicated to serving and protecting the interests of past and present active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, TROA now has a membership of approximately 400,000 current and former officers and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress, and, on rare and extreme occasions, before courts of the United States.

The VFW was formed almost a century ago to protect the interests of men and women (and their families and survivors) who have risked their lives in defense of the United States of America in foreign campaigns. Its membership contains all ranks and grades of past and present members of the armed forces of the United States and today numbers over 2.1 million.

The twenty-seven other military and veteran organizations have a combined membership of over a million and a half current and former members of the uniformed services of the United States. Some of these organizations are focused on the interests of certain specializations within the uniformed service (*e.g.*, the Military Chaplains Association; the Association of Military Surgeons of the United States); some on particular branches of military service (*e.g.*, the Air Force Association; the Marine Corps League; the Fleet Reserve Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Assocation; Commissioned Officers Association of the U.S. Public Health Service). Some of these organizations are of relatively recent origin (*e.g.*, the Enlisted

---

[2] A complete listing and description of the organizations joining in this brief appear as Appendix A to this brief.

Association of the National Guard of the United States (founded in 1970); the National Order of the Battlefield Commissions (founded in 1978)); some have been championing the cause of the military services for a century or more (*e.g.*, the Jewish War Veterans of the USA (founded in 1896); the National Guard Association of the United States (founded in 1878)).

Old or new, large or small, each of the twenty-nine military and veteran organizations that have joined in this brief shares one common thread: they stand to assure that those men and women who have risked, and in some cases sacrificed, their lives in defense of the United States of America are treated with fairness and accorded the respect and dignity their service has earned. They join together in this brief because, as the decision of the Supreme Court of Oregon sadly demonstrates, military retirees have recently become the victims of states' invidious efforts to withhold property taken in violation of the Constitution of the United States. Because Oregon and other states are undermining the very values that their members fought to protect, these organizations join together to urge this Court to reverse the decision of the court below and send an unmistakable message to all taxing authorities that integrity and fairness must be the cornerstones of governance, not gamesmanship.

REASONS FOR GRANTING THE PETITION

In certain respects, this case is old hat: it is but the latest in a long line of cases coming to this Court challenging a state's denial of refunds of taxes imposed on federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court has seen 24 petitions from 16 states.[4] This Court has granted plenary review

---

[4] Arkansas—*Pledger v. Bosnick*, 113 S. Ct. 3034 (1993); Arizona—*Estate of Bohn v. Waddell*, 113 S. Ct. 3000 (1993); Colo-

and reversed in three post-*Davis* cases [4] and it has yet to allow a state to refuse altogether to refund taxes unconstitutionally imposed on federal retirees. Simply to assure application of its post-*Davis* jurisprudence in Oregon as in all other states that discriminatorily taxed federal retirees, this Court should grant the petition and reverse the decision below.

In another respect, however, this case has a far broader and more ominous impact: it represents another example of the disturbing trend among state courts to disregard and defy this Court's mandates in the name of fiscal expediency. There can be no dispute that the court below failed to heed this Court's holding in *Reich v. Collins*, 115 S. Ct. 547 (1994): in all pertinent respects the decision below is a mirror image of the Georgia Supreme Court's decision in *Reich*. Indeed, if anything, the case below paints a more compelling picture of a "bait and switch" than did *Reich*.

---

rado—*Kuhn v. Colorado*, 504 U.S. 901 (1992); Georgia—*Reich v. Collins*, 113 S. Ct. 3025 (1993) and 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa*, 502 U.S. 823 (1991); Kansas—*Barker v. Kansas*, 503 U.S. 594 (1992); Massachusetts—*Filios v. Commissioner of Revenue*, 114 S. Ct. 1538 (1994); Missouri—*Hackman v. Missouri Department of Revenue*, 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana*, 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler*, 113 S. Ct. 3027 (1993) and 115 S. Ct. 779 (1994); Oregon—*Nutbrown v. Munn*, 502 U.S. 1030 (1992); North Carolina—*Swanson v. Powers*, 112 S. Ct. 871 (1992); *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993) and 115 S. Ct. 662 (1995); South Carolina—*Bass v. South Carolina*, 501 U.S. 1246 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Department of Taxation*, 501 U.S. 1247 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Department of Taxation*, 501 U.S. 1247 (1991) and 113 S. Ct. 3024 (1993); West Virginia—*Brown v. Paige*, 115 S. Ct. 207 (1994); Wisconsin—*Hogan v. Musolf*, 502 U.S. 1030 (1992).

[4] *Barker v. Kansas*, 503 U.S. 594 (1992); *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993); *Reich v. Collins*, 115 S. Ct. 547 (1994).

As this Court recently reiterated in *National Private Truck Council v. Oklahoma Tax Commission*, 115 S. Ct. 2351, 2354 (1995), "principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration." The decision below is a chilling example of how taxing authorities and state courts are exploiting this deference at the expense of taxpayers' federally guaranteed rights. Knowing that this Court typically is the only federal court that has jurisdiction to entertain a federal law challenge to state taxation, and knowing that this Court does not and cannot grant every petition presenting an erroneous application of federal law, state courts are brazenly defying this Court's mandates in pursuit of pecuniary gain. Review by this Court is necessary here to reassert the primacy of federal law and preserve this Court's role as the supreme court of the United States.

I. THE DECISION BELOW IS IRRECONCILABLE WITH *REICH*

There can be no dispute that the court below failed to heed the mandate of *Reich*. The decision below is a virtual carbon copy of the Georgia Supreme Court's decision in *Reich*; indeed, if anything, the decision below is more egregious than the Georgia Supreme Court's.

Like the court below, the Supreme Court of Georgia had construed the state's tax refund statute to deny federal retirees refunds of the taxes unconstitutionally imposed on their pensions. In holding that the Supreme Court of Georgia had unfairly reconfigured Georgia's refund scheme, this Court focused on four factors: 1) the plain language of the refund statute; 2) the state's representations about the scope of that statute in federal court; 3) judicial construction of that statute; and 4) states' ordinary preference that taxpayers pursue only postdeprivation remedies. *Reich*, 115 S. Ct. at 549. Consideration of these factors in this case yields the same conclusion: Oregon has unfairly reconfigured its tax scheme so that

it can deny federal retirees refunds of taxes the Constitution forbade it to assess.

1. As in Georgia, Oregon law contains an omnibus tax refund statute providing that, upon timely application, "any excess tax *shall be refunded* with interest . . . ." Or. Rev. Stat. § 305.270(1), emphasis added. And, as in Georgia, the state Supreme Court concluded that this ostensibly available remedy was in fact inapplicable and that instead taxpayers were required to follow essentially a pay under protest route. *See* Or. Rev. Stat. § 305.765 (providing for refunds in cases of invalidated taxes in the years of and after the initiation of the challenge to the tax).

Reich made clear that the measure of the constitutional sufficiency of state refund schemes must be taken from the perspective of a "reasonable taxpayer." 115 S. Ct. at 550; *see also* 115 S. Ct. at 549 (focusing on the "average taxpayer"). A reasonable taxpayer, reading the omnibus refund statute, could only conclude that the language "any excess tax shall be refunded" provided an entitlement to a refund of any taxes paid in excess of what was due.

The court below, however, rejected this reasonable construction of the omnibus refund statute and concluded instead that Or. Rev. Stat. § 305.765 was the exclusive means to recover refunds of taxes determined to be invalid. For at least two reasons, the plain language of Or. Rev. Stat. § 305.765 does not bear out this construction.

First, that statute does not concern taxpayers' *claims* for refunds. Rather, it affirmatively obligates the state, in cases of invalidated tax laws, to make refunds to all taxpayers who paid the unlawful tax, irrespective of whether they made a claim for such a refund. That is, the law requires the state to refund "*all taxes collected and paid under the law* or part thereof invalidated"; to make a "detailed report . . . of each taxpayer who paid

an invalid tax under the law"; and to "issue [and forward] a warrant in favor of each taxpayer listed in the report." Or. Rev. Stat. §§ 305.765, 305.770 (emphasis added). Thus, on its face Or. Rev. Stat. § 305.765 affirmatively imposes an obligation on the state without purporting to limit taxpayers' other remedies.

Indeed, Or. Rev. Stat. § 305.765 specifically provides that it applies only "if there is no other statute authorizing [a] refund." Here, of course, the omnibus refund statute specifically authorizes a refund to taxpayers who timely applied for income tax refunds. Thus, these statutes work neatly together: the omnibus refund statute provides relief to taxpayers who timely seek relief; Or. Rev. Stat. § 305.765 provides relief to taxpayers who paid taxes subsequently declared to be invalid, but who did not timely file refund claims.

Accordingly, a reasonable taxpayer would not have read Or. Rev. Stat. § 305.765 to be the "*exclusive* remedy for unlawful taxes." *Reich,* 115 S. Ct. at 550, emphasis original. Rather, a reasonable taxpayer would have concluded that that remedy was applicable only to those who did not file a timely claim for a refund; for those who did, the omnibus tax refund statute provided full relief. Looking no further than the plain language of the applicable refund statutes, an Oregon taxpayer would "think it obvious" that he was entitled to a refund under Oregon's omnibus tax refund statute, Or. Rev. Stat. § 305.270. *Reich,* 115 S. Ct. at 549.

2. The second factor relied upon in *Reich* was Georgia's convincing representation in the Eleventh Circuit that its refund statute provided a sufficiently "plain, speedy and efficient" state court remedy to preclude federal jurisdiction. 115 S. Ct. at 549, *citing Waldron v. Collins,* 788 F.2d 736, 738 (11th Cir.), *cert. denied,* 479 U.S. 884 (1986). Here, Oregon has done Georgia one better: it has made its representation about the applicability of Or. Rev. Stat. § 305.270 not just in any fed-

eral court, but indeed in the Supreme Court of the United States.

Specifically, in *Nutbrown v. Munn*, 811 P.2d 131, 143 (1991), *cert. denied*, 502 U.S. 1030 (1992), the Supreme Court of Oregon held that federal retirees were not entitled to relief under 42 U.S.C. § 1983 because they had failed to exhaust their administrative remedies. In successfully urging this Court to deny the ensuing petition for certiorari, the state argued that resort to federal causes of action was unnecessary as full relief was available under state law. *See* Pet. App. H at 48a-49a. The statutes the state identified as providing this complete relief were Or. Rev. Stat. § 305.270 (providing for refunds of "any excess tax"), Or. Rev. Stat. §§ 305.220 and 305.222 (fixing interest on refunds) and Or. Rev. Stat. § 314.415 (allowing for refund claims to be made up to three years after the taxes have been paid). *Id.* Yet, just as in Georgia, after making this representation, the state later convinced its Supreme Court that these same provisions were wholly inapposite. Pet. App. 12a.

3. In concluding that Georgia had reconfigured its refund scheme in midstream, this Court also focused on the absence of any state court decisions purporting to limit the apparent breadth of the refund statute. *Reich*, 115 S. Ct. at 549. As in Georgia, the court below failed to cite any authority adopting its limited construction of Oregon's refund statutes that predated the payment of the taxes in issue here. Indeed, other than the federal retiree refund cases, there is not a single case in Oregon history applying Or. Rev. Stat. § 305.765. Thus, the best the court could come up with to support its novel and parsimonious construction of Oregon's omnibus tax refund statute was a selective recitation of Attorney General opinions issued around the time of the passage of the refund statute. *See* Pet. App. A at 8a-9a.

Although not apparent from the decision below, Oregon caselaw is replete with instances where taxpayers have

obtained refunds of invalidly imposed taxes for tax years predating the initiation of the action. For example, in *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375, 380 (Or. 1965) the Supreme Court of Oregon held a corporate income tax invalid under the Supremacy Clause and refunded taxes imposed during the three years preceding the initiation of the challenge. Similarly, in *Wood v. Department of Revenue*, 749 P.2d 1169, 1174 (Or. 1988), the court invalidated a state personal income tax under the Privileges and Immunities Clause and refunded taxes imposed during the three years preceding the initiation of the challenge. *See also Waterbury v. Department of Revenue*, 11 Or. Tax 314, 316 (1989) (providing refunds, interest and attorney fees for personal income taxes assessed in violation of the intergovernmental tax immunity doctrine).

The most compelling evidence of Oregon's about face on the scope of the refund statute, however, is found in *Nutbrown v. Munn*, 811 P.2d at 1141. In that § 1983 action, federal retirees sought refunds of the taxes imposed during the years 1985 through 1988. In dismissing the suit, the Oregon Supreme Court held that Or. Rev. Stat. § 305.270 provided federal retirees full relief:

> [T]he Department can (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system.

Id. In its decision below, the court did not even mention, much less seek to explain, this absolute reversal in its construction of Oregon's tax refund statutes.

As noted above, the closest the court below could come to finding support for its novel and counterintuitive construction of the omnibus tax refund statute was citation of two tangential Attorney General opinions. The court failed to cite, however, the most germane Attorney General opinion; indeed, one that is directly on point. Specifically, after the Supreme Court of Oregon held in

Meredith v. State Tax Commission, 96 P.2d 1082, 1085 (Or. 1939), that the salary of an employee of a government owned corporation could not be subjected to Oregon income tax, the question arose whether other nonlitigating employees of federally owned corporations were entitled to refunds. Citing the prior codification of the omnibus tax refund statute, the Attorney General concluded:

> [T]he commission has no authority to refund a tax paid under a mistake of law unless the refund is made, or *a claim therefor is filed* by the taxpayer, *within two years from the time the tax was paid.*

19 Op. Att'y Gen. 557 (Or. 1940), *reproduced at* Pet. App. F at 43a-46a (emphasis added).

Thus, here again, Oregon has done Georgia one better. Not only is the limited reading of the omnibus tax refund statute bereft of authority, and not only is there uniform precedent confirming the apparent breadth of Or. Rev. Stat. § 305.270, but so too there is a contrary Attorney General opinion directly on point.

4. Lastly, in *Reich*, this Court "f[ou]nd it significant that, for obvious reasons, States ordinarily *prefer* that taxpayers pursue only postdeprivation remedies; *i.e.*, that taxpayers 'pay first, litigate later.'" 115 S. Ct. at 549 (emphasis original). Georgia, of course, claimed that it provided and preferred its taxpayers to pursue predeprivation remedies. Oregon, however, makes no such claim. Rather, as the court below held, "[t]here is no question that Oregon's statutes encourage payment of a tax before litigation of a claim for relief." Pet. App. A at 15a.

Thus, on every level the decision below is irreconcilable with *Reich* and even more egregious than the Georgia Supreme Court's. Oregon has strained mightily to keep the federal retirees' property in defiance of its own statutes and the Constitution of the United States; in so doing it has strained credulity. Review by this Court is necessary to assure that no state may escape its obligation

to return the taxes unconstitutionally imposed on federal retirees by resort to "bait and switch" tactics that make a mockery of due process.

II. THIS COURT CANNOT ALLOW STATES' NOTIONS OF FISCAL EXPEDIENCY TO EXCUSE DEFIANCE OF ITS DECISIONS

Much of this Court's § 1983 jurisprudence is built around Congress' recognition that state officers and state courts may not always be trusted to vindicate federally protected rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). In part for this reason, § 1983 was enacted as "an attempt to remedy the state courts' failure to secure federal rights." *Id.*, 407 U.S. at 241.

By operation of "principles of federalism and comity," however, taxpayers are ordinarily remitted exclusively to state courts and state procedures to seek protection of their federal rights. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S. Ct. at 2354. Recent experience, exemplified by the decision below, shows that state courts are abusing the deference this Court accords them in tax matters, even to the point of simply ignoring this Court's decisions. The Eleventh Amendment and principles of comity have become the states' refuge; but neither the Constitution nor the prudential principles that underlie our jurisprudence requires that states be allowed so flagrantly to disregard their obligations to treat their taxpayers fairly and even-handedly.

While the decision below is shocking in its brazen disregard of *Reich*, what is more shocking and disturbing is that the decision is anything but an anomaly. Indeed, its virtual twin is already pending on this Court's docket. *See General Motors Corp. v. Kansas City, Missouri*, U.S. No. 95-195 (petition for certiorari filed July 21, 1995). In that case, the state court denied refunds on the basis of a newly adopted construction of a refund statute; a construction that had previously been rejected by the trial

court and the intermediate appellate court in that very case. Similarly, on remand in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), the Department of Taxation argues that "*Reich* has no application" [5] and taxpayers are entitled to no relief, even though Virginia provides by statute that "the Tax Commissioner *shall order a refund*" of erroneous assessments of tax. Va. Code § 58.1-499.

State courts and state taxing authorities have simply ignored *Reich* and continued to employ the "bait and switch" stratagems condemned by this Court. The decision below, the decision in *General Motors Corp. v. Kansas City*, and the arguments put forth on remand in *Harper* are a direct affront to the authority of this Court. Whether it is because they believe the chances of further review are too remote, or because the fiscal demands on the state are so great, state courts and state taxing auhorities "having ears to hear, hear not" the pronouncements of this Court. *Mitchum v. Foster*, 407 U.S. at 241. Review by this Court is necessary to remind state courts and state taxing authorities that they may not ignore this Court's decisions simply because compliance would be expensive. And, just as in the civil rights cases that have informed much of this Court's recent jurisprudence, bold and decisive action is required to underscore that neither the Constitution nor this Court will tolerate gamesmanship in state tax matters.

---

[5] *See* Brief for Appellee at 42, *Harper v. Virginia Department of Taxation*, No. 940326 (Va.) (argued June 7, 1995).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Oregon should be granted and its decision reversed.

Respectfully submitted,

MICHAEL J. KATOR *
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

September 14, 1995

* Counsel of Record